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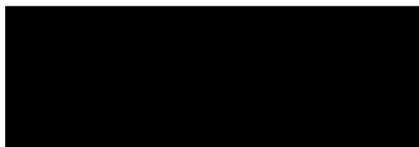
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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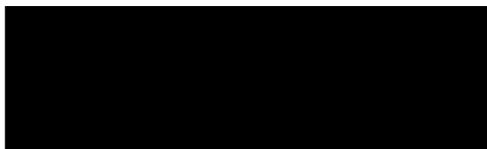
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a steel business.¹ It seeks to employ the beneficiary permanently in the United States as a welder. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, an additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

¹ The petitioner is organized as a corporation as [REDACTED] and according to its income tax return, it conducts business as a subcontractor providing a steel fabrication service. The petitioner's Federal Employer Identification Number (FEIN or EIN) is [REDACTED]. The EIN is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. See [http://www.irs.gov/businesses/small/\[REDACTED\].html](http://www.irs.gov/businesses/small/[REDACTED].html) accessed November 19, 2009.

to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200.00 per year).

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004).²

Accompanying the petition and labor certification, counsel submitted, *inter alia*, the first two pages of the petitioner's federal income tax return (Form 1120) for 2006.

On January 20, 2009, the director issued a Request for Evidence (RFE) asking the petitioner to submit information, *inter alia*, regarding the petitioner's ability to pay the proffered wage according to the regulation at 8 C.F.R. § 204.5(g)(2) from the priority date onward. The director requested the petitioner's federal income tax returns for 2001 through 2005, 2007, and 2008. Also the director requested the petitioner's quarterly tax returns (Forms 941) for the four calendar quarters of 2008. Regarding the beneficiary, the director requested the petitioner submit Wage and Tax Statements (W-2) or 1099-MISC Statements, issued to the beneficiary during 2001 through 2008.

In response, counsel submitted an explanatory letter dated March 2, 2009, and, *inter alia*, the following documents: an untitled exhibit; W-2 statements for the period 2001 through 2008, and a pay statement from two corporations which are [REDACTED] and [REDACTED] and the petitioner's federal income tax returns (Forms 1120) for 2001 through 2005, and for 2007. Additionally counsel submitted the petitioner's Employers Quarterly Federal Tax Forms (Forms 941) statements for 2008.

Accompanying the appeal, counsel submitted a brief dated August 6, 2009, an exhibit entitled "Index of Documents ..." and the following documents: an explanatory letter dated July 7, 2009, from the petitioner's accountant with an exhibit entitled "Schedule 1 ...;" and the petitioner's annual reports (based upon its fiscal year ending February 28) for years 2003, 2004, 2005, 2006, 2007, and 2008);³ an affidavit from [REDACTED] corporate secretary of the petitioner dated July 31,

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

³ All the annual reports noted in the record of proceeding are standardized in format. All are accompanied by an accountant's certification entitled "Accountant's Review Report" declaring that the annual reports, which are in the record, are based upon reviews, not audits, of the petitioner's

2009, together with approximately eight copies of secured lending documents dated in 1999 and 2001; a letter dated July 6, 2009, from the president of the petitioner, concerning his serious health problem, with a physician's letter; a report dated summer 2002, entitled "The Effects of September 11, 2001 on the Construction Industry;" a copy of the case decision *Construction and Design Co. v. USCIS*, 563 F. 3d 593 (7th Cir. 2009) with related documents; and an unpublished AAO decision.⁴

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1995. According to the tax returns in the record, the petitioner's fiscal year commences on March 1st and ends on February 28th of each succeeding year. On the Form ETA 750B, and signed by the beneficiary on April 14, 2001, and August 16, 2007, the beneficiary claimed to have worked for the petitioner since November 11, 1995, to present (i.e. April 14, 2001).

According to the Form G-325 in the record, dated October 19, 2007, the beneficiary stated that he had worked for another entity, [REDACTED], as a welder from November 2002 to "present time" (i.e. October 19, 2007).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg.

finances. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the appeal are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The regulation requires financial statements to have been audited in order for the statement to meet the requirements of 8 C.F.R. § 204.2(g)(2).

⁴ Counsel refers to a decision issued by the AAO concerning the submission of additional evidence (and realistic job offers) on appeal, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of U.S. Citizenship and Immigration Services (USCIS) are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). However, the record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent

either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120 stated net income of <\$139,132.00>.⁵
- In 2002, the Form 1120 stated net income of <\$42,416.00>.
- In 2003, the Form 1120 stated net income of <\$11,690.00>.
- In 2004, the Form 1120 stated net income of \$62,105.00.
- In 2005, the Form 1120 stated net income of \$20,722.00.
- In 2006, the Form 1120 stated net income of \$189,063.00.
- In 2007, the Form 1120 stated net income of \$112,025.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003, and 2005, nor did it have sufficient net income to pay the “fully burdened”⁶ wage of \$43,680.00 per year, nor the prevailing wage of \$31,200.00. The petitioner has failed to establish that its net income was sufficient to cover the “fully burdened” wage rate, as required by *Construction and Design*. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see also Construction and Design*, 563 F.3d 593, 596 (7th Cir. 2009). If the initial evidence does not demonstrate eligibility for the benefit sought, USCIS may deny the petition. 8 C.F.R. § 103.2(b)(8).

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁶ *See* pages 8-9 herein.

petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the Form 1120 stated net current assets of <\$182,022.00>.
- In 2002, the Form 1120 stated net current assets of \$89,188.00.
- In 2003, the Form 1120 stated net current assets of <\$121,588.00>.
- In 2004, the Form 1120 stated net current assets of \$119,056.00.
- In 2005, the Form 1120 stated net current assets of <\$124,367.00>.
- A complete Form 1120 was not submitted for 2006. No Schedule L was submitted. Therefore, the petitioner's net current assets can not be ascertained from evidence required by the regulation at 8 C.F.R. § 204.5(g)(2).
- In 2007, the Form 1120S stated net current assets of \$52,007.00.

The petitioner did not have sufficient net current assets to pay the fully burdened wage rate for the years 2001, 2003, 2005, and 2006, as required by [REDACTED]

For years 2001, 2003, 2005, and 2006, the petitioner could not pay the proffered wage through an examination of its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income or net current assets for years 2001, 2003, and 2005.

On appeal, counsel asserts in pertinent part as follows: The tax returns submitted to USCIS were prepared and filed with the IRS using the cash basis rather than the "accrual basis" accounting method. Counsel did submit the petitioner's accountant's letter statement supporting his contention and the petitioner's annual reports utilizing "the percentage-of-completion method for long-term construction contracts' accounting method" which reports were prepared according to the accrual method of accounting.

The AAO notes that the petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid.

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, the tax returns were submitted on a cash convention but the annual reports, which are compiled rather than audited were prepared a different way, the accrual convention.

The AAO is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Further, counsel contends that the case of *Construction & Design Co. Id.*, provides that the petitioner's "cash flow" (either existing or anticipated cash revenues) may be evidence of its ability to pay the proffered wage. Counsel's contention must be qualified. As stated in *Taco Especial, supra*:

In *Construction & Design Co. v. United States Citizenship and Immigration Services*, 563 F.3d 593 (7th Cir. 2009), Judge Posner found that net income may not accurately reflect a corporation's ability to pay a proffered wage. He specifically noted that a profitable company may still show no taxable income because corporate profit is transferred into salaries. *Id.* at 596. Instead, he stated that the government should focus on cash flow. *Id.* at 595 ("If the firm has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can 'afford' that salary."). However, he also emphasized that the employer bears the burden of proof in establishing ability to pay and must show where "the extra money... would be coming from." *Id.* at 596.

It is noted that the instant case arose in the seventh circuit. Therefore, in this case, the AAO is bound by precedent decisions of the circuit court of appeals for the seventh circuit. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

The seventh circuit court of appeals recently issued a precedent decision in *Construction and Design Co.* In that case, the seventh circuit directly addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The employer in *Construction and Design* was a small construction company which was organized as a Subchapter S corporation. The employer sought to

employ the beneficiary at a salary of over \$50,000 per year.⁸ The court noted that, according to the employer's tax returns and balance sheet, its net income and net assets were close to zero.⁹ The court also noted that the owner of the corporation received officer compensation of approximately \$40,000.¹⁰

In considering the employer's ability to pay the proffered wage, the court stated that if an employer "has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure."¹¹

The court then turned to an examination of the USCIS method for determining an employer's ability to pay the proffered wage. The court noted that USCIS "looks at a firm's income tax returns and balance sheet first."¹² The court, recognizing that the employer bears the burden of proof, went on to state that if the petitioner's tax returns do not establish its ability to pay the proffered wage the petitioner "has to prove by other evidence its ability to pay the alien's salary."¹³ The court found that the employer had failed to establish that it had sufficient resources to pay the proffered wage "plus employment taxes (plus employee benefits, if any)."¹⁴

Thus, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method, which is described in detail herein, involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612.

Further, the court in *Construction and Design* noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." As noted above, because the instant case arose in the seventh circuit, the AAO is bound by the seventh circuit's decision in *Construction and Design*. Therefore, pursuant to the decision in *Construction and Design*, the petitioner in the instant case must establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and

⁸ 563 F.3d at 595.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 596.

¹³ *Id.*

¹⁴ *Id.*

state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The costs of such benefits are significant. The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by 1.4.¹⁵ In this case, as noted above, the proffered wage as stated on the Form ETA 750 is \$31,200.00 per year. Using the OMB-approved formula, the "fully burdened" wage rate in this case equates to \$43,680.00 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case must establish its ability to pay \$43,680.00 per year.

Concerning this burden of proof, under generally accepted accounting principles (GAAP) the sources of cash are disclosed in a cash flow statement. The general categories are: cash received from operations, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with an audited balance sheet and income statement present an analysis of the financial health of a business. Documentary evidence, such as a detailed business plan and audited cash flow statements can demonstrate the petitioner's overall financial position. See <http://www.planware.org/cashflowforecast.htm> accessed November 2, 2009. However audited financial statements and a business plan were not submitted by the petitioner, so counsel's contention is not supported by sufficient evidence.

Counsel in her brief dated August 6, 2009, states that a company may borrow money to pay the proffered wage, and she has introduced approximately eight copies of secured lending documents dated in 1999 and 2001, as evidence of the petitioner's ability to pay the proffered wage. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, lines of credit or, in this case, evidence of secured lending arrangements which provide a business credit line¹⁶ to draw upon. Counsel's contention is most analogous to a line of credit. Since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

¹⁵ The 1.4 multiplier is from the Bureau of Labor Statistics 2009: <http://www.bls.gov/news.release/eccc.t01.htm>.

¹⁶ A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See Barron's Dictionary of Finance and Investment Terms, 45 (1998).

Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Further, the petitioner's assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

Counsel asserts that, "unlike the tax returns," the annual reports¹⁷ demonstrate that the petitioner had sufficient assets, in the illustrative table prepared, identified as "working capital" sufficient to pay the proffered wage from years 2002 through 2007.

While counsel argues that the "working capital" calculation shows the petitioner has the ability to pay the proffered wage, she provides no authority or precedent decisions to support the use of such alternate calculations in determining the petitioner's ability to pay the proffered wage. Moreover, because these calculations are not designed to demonstrate an entity's ability to take on the additional, new obligations such as paying an additional wage, this office is not persuaded to rely upon it.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for

¹⁷ The accountant's statements within the annual reports are based upon reviews, not audits. In pertinent part, the accountant's certification accompanying each reports states:

A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Counsel contends that the petitioner's president's health problems between 2001 through 2003, which were eventually remedied, and the events of September 11, 2001 caused the petitioner's financial performance to suffer. Counsel introduced a letter dated July 6, 2009, from the president of the petitioner concerning his serious health problem as confirmed by a physician's letter, and also, an affidavit from [REDACTED] corporate secretary of the petitioner dated July 31, 2009; and additionally, a report dated Summer 2002, entitled "The Effects of September 11, 2001 on the Construction Industry," in substantiation of her contentions.

The record of proceeding does not contain sufficient evidence specifically connecting the petitioner's business "decline" to the events of September 11, 2001. A mere broad statement by counsel or by the petitioner that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. Furthermore, neither the petitioner's president's health problems nor the events of September 11, 2001 appear connected in any way to the petitioner's financial problems in 2005.

The AAO also notes that the petitioner's tax returns suggest that the petitioner's gross receipts in 2001-\$2,305,862.00, 2002-\$4,117,517.00, and 2003-\$3,939,234.00 were substantial and, in light of similar results in succeeding years, are indicative of an increase in business receipts during the period 2001 through 2003, and onwards. However, despite the general increase in gross receipts, an examination of the petitioner's net income or net current assets for seven years demonstrates in for years 2001, 2002, 2003, and 2005, that the petitioner could not pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

An additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 states that the position requires one year of experience or one year of experience in the related occupation of apprentice welder.

The beneficiary under penalty of perjury stated in Form ETA 750B that he was employed beginning November 1995 by the petitioner performing the duties of welder as stated in the job description. Prior to the above employment, the beneficiary stated that he was employed as an apprentice welder by the petitioner from November 1990, to November 1995, assisting the more experienced welders.

The Form ETA 750, Part A, Line 13, describes the job duties of welder as follows:

Must perform services as a welder for steel mill (company). In so doing, must possess the knowledge and skill relative to welding finished steel. Must operate all welding tools and equipment, e.g. welders, spot welders, cooling equipment, etc. In addition, must be familiar with all equipment involved in the production of rough and finished steel. In addition, must be familiar with the ARC method of welding.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

Counsel submitted a letter dated October 8, 2007, from [REDACTED] president of the petitioner who states the offered job duties are as stated on April 2001, when the labor certification was accepted and recounts in summary those job duties stated in the Form ETA 750. According to the letter, the petitioner intended to employ the petitioner "around January 2008."

According to Mr. [REDACTED] letter, the beneficiary was employed by [REDACTED] from November 15, 2002, to at least October 8, 2007, the date of his letter. A USCIS Form G-325, signed and dated on October 19, 2007, by the beneficiary also indicates that he was employed by [REDACTED] as a welder from November 2002, to present (i.e. October 19, 2007).

In response to the director's request for evidence (RFE) dated January 20, 2009, counsel submitted in her response received on March 3, 2009, a copy of the letter of [REDACTED] vice president of [REDACTED] Melrose Park, Illinois, dated February 24, 1998, stating:

[The beneficiary] has been employed with [REDACTED] as a welder since 01/16/95. He is currently working 40 hours per week and earns [\$] 9.25 per hour. His employment history is excellent.

The [REDACTED] work experience was not stated on the labor certification. Since the dates of [REDACTED] employment stated in the letter were from January 1, 1995, to at least February 24, 1998, the dates provided in the letter are inconsistent those the beneficiary provided in his sworn statement in the labor certificate concerning employment with the petitioner from November 1990, to at least April 14, 2001. Further, counsel submitted a Wage and Tax Statement (W-2) from [REDACTED] Illinois, issued to the beneficiary for 2001 in the amount of \$12,844.75. As already stated, the beneficiary stated that he was employed as a welder by the petitioner in 2001.

There are three other items of evidence submitted by the petitioner reputedly to verify his prior employment which are also inconsistent with the beneficiary's statements of his employment history provided in the Form ETA 750B: A W-2 Statement from [REDACTED] for 2000; a W-2 Statement from [REDACTED] of Melrose, Illinois, of, for 2001; and a W-2 Statement from [REDACTED] of Romeoville, Illinois for 2002.

Because of the reputed and inconsistent prior work experience evidence stated by the beneficiary in the labor certification and submitted by the petitioner, the AAO is unable to determine the truth and falsity of the matter. There is no explanation in the record for these inconsistencies.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.